No. 14072

United States Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to the custody of the Attorney General for a period of two years. [16-17][1] The district

[1] **Bracketed numbers herein refer to pages of printed Transcript of Record in this case.**

court made no findings of fact or conclusions of law. No reasons were stated orally by the court for the judgment rendered. [16-17] Title 18, § 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charges an offense against the laws of the United States. The appellant was charged with a refusal to submit to induction contrary to the provisions of the Universal Military Training and Service Act. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1), (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [17-18]

STATEMENT OF THE CASE

The indictment charges appellant with a violation of the Universal Military Training and Service Act. [3-4] It is alleged that appellant registered with Local Board 130 in San Bernardino County, California. It is alleged that he was finally classified in Class I-A, making him liable for military training and service. It is alleged that he thereafter was ordered to report for induction in the armed forces. [3-4] It is alleged that Hacker knowingly "failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4] Appellant was arraigned. He pleaded not guilty. [4-5] He waived trial by jury. [5-6] The case was called for trial on August 4, 1953. [7] Evidence was heard. [19-33] A motion for judgment of acquittal was made at the close of the evidence. [8-10] It was briefly argued and the court then took the case under advisement and continued it until August 26, 1953. [10, 34] The motion for judgment of acquittal was denied. [10-11, 38] Appellant was found guilty on August 26, 1953. [11-12] A motion for new trial was filed. [12-14] Thereafter an order was made denying such motion. [15] A judgment of conviction was entered on September 8, 1953. [16-17] Notice of appeal was duly filed. [17-18] Bail was

allowed pending appeal. [42] The transcript of the record, including the statements of points relied on, has been duly filed. [45-46]

THE FACTS

Defendant, born in Colorado on December 31, 1932, was named John Henry Wilson. Thereafter his parents were divorced and his mother took custody of him at an early age. She remarried to Haskell W. Hacker, the stepfather of appellant. At an early age he took the name of Hacker and abandoned the use of the name Wilson without getting the name legally changed. [21-22] Hereafter in this brief he will be referred to (as originally in his papers and in the indictment) as Hacker.

Hacker registered with his local board on January 3, 1951. (1)[2] A questionnaire was mailed to him on January 21, 1952. (1) He filed it on February 1, 1952. (8) He gave his name and address. (9) In Series VI he answered and said he was a minister of religion, regularly and customarily serving as such under the direction of Watchtower Bible and Tract Society since November 1, 1950. (10) Hacker showed that he had been ordained on September 20, 1942, at Los Angeles, California. (10) He referred to papers accompanying his questionnaire in proof of his ministry. He went into considerable detail. His proof supporting the claim in the questionnaire for ministerial status shall here only be briefly summarized.

Hacker referred to the order of General Hershey finding that Jehovah's Witnesses and Watchtower Bible and Tract Society were a recognized religious organization. (18) He attached a certificate of ordination duly issued on January 9, 1952, by T. J. Sullivan, Superintendent of Ministers

[2] **The draft board file (cover sheet) was received into evidence. [20] Each page therein is numbered twice. Numbers appearing at the top of the pages do not have a circle around them; numbers at the bottom are encircled. The numbers appearing herein in "parentheses" refer to the numbers at the bottom of the pages of the draft board file that are encircled.**

and Evangelists of the Society. This certified that Hacker had been duly ordained on September 20, 1942, and had been in the full-time ministry as a pioneer, acting under the direction of the society, since November 1, 1950. (18) The certificate stated that he was authorized to perform all the usual rites and ceremonies of Jehovah's Witnesses. (18) In a written statement accompanying the questionnaire he referred to the photostatic copy of the certificate or ordination. (18)

Hacker then emphasized the fact that he was a full-time minister of Jehovah's Witnesses. He stated that as such he was assigned to a congregation. In support of his having a congregation he referred to an affidavit of all the members of the congregation that he was its only full-time minister. (18) He said too that he worked for the Spanish church of Jehovah's Witnesses, the only Spanish church of Jehovah's Witnesses in California. (18) He then stated that his full-time vocation as a minister required his devoting one hundred hours preaching to the people outside of his own congregation. He said that he regularly and customarily preached as a missionary evangelist in the homes of the people for the purpose of building up the congregation to which he was assigned. (18)

In his typewritten statement accompanying the questionnaire he also showed that he had been preaching since early childhood. He stated he had been ordained and baptized in 1942 and that since that date to the date he became a full-time minister he had been acting as a part-time preacher under direction of the Society. (18) He referred to proof showing that since 1942 he had been preparing for the full-time ministry that he entered in 1951. (18) He emphasized by proof that despite his youth he was capable of serving as a full-time minister of religion. (18)

Hacker then stated an extensive review of his ordination. He said he had been formally ordained and that he had gone through the ceremony of baptism which is the ceremony employed by Jehovah's Witnesses. (19) He then

gave an extensive history of his ministerial service in different official capacities at different congregations. (20)

Hacker emphasized that the local Spanish congregation recognized him as their "only full-time minister." He referred to a petition signed by a large number of the members of the Spanish congregation. (20-21)

He stated that the most important part of his ministry was calling on the people in their homes. He spent one hundred hours per month of the time devoted to his ministry calling on people who have no other means of learning about God's Kingdom and of the purposes of Jehovah. (22) His vocation was this missionary work. (22)

Hacker referred to the fact that he had a part-time secular job. He had shown his part-time employment in his questionnaire. (11) He showed that he was working as bus driver for the Chino School District and that he received $1.40 per run. He averaged only about fifteen hours per week to the performance of such secular work. (12) In his separate statement he explained that each run averaged between one-half to one hour. (22) He received only $640.40 yearly for the performance of his duties as school bus operator. (22) He devoted his full time to the ministry and part time to secular work. He emphasized the fact that he drove the bus only early in the morning and late in the afternoon. (11) His employment extended only during the school months of the year. (11-12, 22)

Hacker stated in the separate statement that there were a large number of Bible study classes that he conducted in different homes as a minister of religion. (23) He referred extensively to his preparation and training for the ministry. He had been properly schooled for the ministry. (24) He filed certificates by two ministers who were instructors in the school certifying to his receiving proper training for the ministry. (25)

On February 4, 1952, the local board wrote to Hacker about his use of the name "John Henry Wilson" in his ques-

tionnaire. (27) Hacker answered and promised to supply a birth certificate later. (28)

The local board classified him in I-A on February 25, 1952. This made him liable for unlimited military service. (15) On March 15, 1952, he requested a personal appearance. (30) He was notified to appear on March 20, 1952. (34) At the trial in the court below he testified to some discrepancies in the memorandum made by the local board as to what took place at his personal appearance. (26-28) The discrepancies were not too substantial or necessary to mention. (26-28)

The memorandum of the personal appearance showed that Hacker claimed to be an ordained minister of Jehovah's Witnesses and that the congregation recognized him. Members of the board asked him if he could perform marriage ceremonies and if he had a regular church. (35) He showed that he was one of the few of Jehovah's Witnesses engaged in preaching full time. (35) In answer to the board's questions, he said he did not get paid from his ministry but made his living driving a school bus. (35) He was asked to supply information about his being fully ordained by ceremony and to get verification as to whether he could "perform marriages." (35)

On March 31, 1952, Hacker filed with the board a letter dated March 28. This letter referred to a certificate enclosed. The certificate showed that he was appointed as the presiding minister of the congregation and that he was duly ordained and authorized to perform marriage and burial ceremonies in the congregation. Accompanying the letter was a newspaper clipping showing he had preached a funeral discourse. (38)

Thereafter the local board, on April 21, 1952, classified him I-A. (15, 40) He was notified of this classification. (15)

On April 29, 1952, he appealed. (15, 41) His file was reviewed by Captain Sanders, the co-ordinator of District No. 6. Captain Sanders returned the file to the local board with request that it mail to Hacker a conscientious objector form. This was done on May 20, 1952. (15) Hacker returned the form unsigned and not filled out, stating, "I do not care to sign either of the two statements, since my claim for exemption is as a minister." (42)

The file was then forwarded to the appeal board. That board, on July 17, 1952, classified him in I-A. (15, 47) The local board also notified the employer of Hacker, Watchtower Bible and Tract Society, by mailing SSS Form 111 to T. J. Sullivan, Superintendent of Ministers and Evangelists for the Society at Brooklyn, New York. (15, 49) On July 21, 1952, the clerk of the local board wrote Hacker returning his birth certificate. The clerk notified him he was getting a new registration number because of the discrepancy in his birth date. Enclosed was notice of the classification given him by the appeal board. (51)

On October 24, 1952, Hacker wrote to the local board explaining why he could not sign the conscientious objector form. He said that the signing of the agreement in the form required him to voluntarily surrender his ministerial status which he refused to do. He offered to fill out the rest of the form if sent to him providing he would be excused from signing the agreement to give up his ministerial status. (56) He enclosed a copy of *The Watchtower* for February 1, 1951, showing that Jehovah's Witnesses are conscientious objectors. (56)

On January 2, 1953, the local board ordered Hacker to report for induction on January 14, 1953. (58) He reported on that date and refused to submit to induction when ordered to do so. He signed a statement to that effect. (60-66)

QUESTION PRESENTED AND HOW RAISED

The undisputed evidence shows that appellant is a minister of religion. It shows he was trained and ordained in his youth, that he began the full-time ministry long before his questionnaire was filed. At the time of his personal appearance it was undeniably established that he had no full-time secular work, but was working part time only as a driver of a school bus. The ministry was shown to be his vocation and that he did not pursue it incidentally to any full-time secular work. His claim was supported by two certificates of the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. One indicated he was duly ordained and appointed as a full-time pioneer missionary evangelist of the Society. The other indicated he was the presiding minister of the local congregation of Jehovah's Witnesses. There was ample corroborating evidence from members of the local congregation that he was the only full-time minister in the congregation. There is nothing in the draft board file anywhere to suggest that the draft board questioned his evidence or the authenticity of his documents. There is no dispute of any of the evidence filed by him showing he was pursuing the ministry as his vocation. The undisputed evidence shows that the part-time secular work in no way interfered with the performance of his duties as a minister of religion.

Upon the personal appearance members of the local board placed significance upon the requirement that a minister show that he was qualified to perform marriage ceremonies under the law of California. While the board members asked appellant to supply information showing he was formally ordained, the record undeniably establishes that fact and there is no basis for question on his ordination.

The question presented, therefore, is whether appellant was denied the classification of a minister of religion, exempt from all training and service, without basis in fact and whether the classification given by the appeal board

was arbitrary and capricious and the result of illegal and irrelevant standards employed by the draft board.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and entering a judgment of guilty against him.

III.

The district court erred in denying the motion for new trial.

SUMMARY OF ARGUMENT

The denial of the ministerial exemption by the appeal board to the appellant is without basis in fact and the classification given to appellant is arbitrary and capricious.

I.

A PROPER CONSTRUCTION OF THE STATUTE AND THE REGULATION EXEMPTS ALL MINISTERS OF ALL RELIGIOUS ORGANIZATIONS PREACHING, AS THEIR VOCATION, THE DOCTRINES OF THEIR CHURCHES. THIS EXEMPTION PREVAILS REGARDLESS OF PART-TIME SECULAR ACTIVITIES PURSUED AS AN AVOCATION INCIDENTAL TO THEIR MINISTRY.

A.

A brief discussion of the legislative history behind the 1948 Act shows an intent to make the exemption broad and liberal.

The purpose of the exemption for ministers of religion

under the different draft laws was to give a legislative exemption. It has never been an executive deferment. No discretion is given to the administrative branch of the Government on this grant of Congress.

Congress intended to insure the people that all their ministers of religion would be kept home. It expressly stated that they would not be taken away. This was because they would have to preach to the people, bury their dead and marry their young.

Legislative history of the different draft laws shows that the exemption is not confined to the minister preaching from the pulpit. It was expressly stated that it extended to lay brothers and other nonpulpit-preaching ministers. The use of the term "regular minister of religion" in addition to the term "ordained minister of religion" shows the broad purpose of Congress. It is a catchall phrase, or a saving clause, to extend the exemption to all nonpulpit-preaching ministers.

The background of the law and the terms of the acts therefore show a definite congressional intent to place a broad and liberal interpretation upon the use of the words "minister of religion" in the act.

B.

The 1948 Act shows a continuing congressional intent to give a broad and generous exemption to ministers, so long as the ministry is pursued by them as their vocation.

Senate Report No. 1268, 80th Congress, 2nd Session, page 13, shows the first intent of Congress to restrict the exemption provided for ministers of religion. It demonstrated a purpose in the 1948 Act to confine it to only those who pursue the ministry as their "vocation."

The report used the word "leader." The word "leader" (in religions) used in the report is expressly controlled by reference in the report to the definition appearing in the bill. The controlling word "vocation" used in the definition of a "minister of religion" in the bill was not narrowed by

the use of the word "leader" in the report. The use of the word "leader" showed an intent to exclude only laymen from the exemption. It did not restrict the exemption of all ministers of religion who pursue the ministry as their "vocation." The act gives the exemption to all ministers of all religions who preach their doctrines as their "vocation."

Nothing appears in the act to show an intent of Congress to prescribe any standard way of preaching and teaching religion. Nowhere in the legislative history of the draft laws or in the 1948 Act is there any attempt to limit it. No definition of the term "preaches and teaches the principles of religion and administers the ordinances of public worship" is given by Congress or the regulations. The phrase is broadened by these words: "as embodied in the creed or principles of such church, sect, or organization." They show a congressional intent to let each separate group decide the proper qualifications of its ministers and methods of preaching to be employed.

No right to set itself up as a religious hierarchy was given to the Government. The absence of any fixed standards in the act rejects any argument of the Government as to what is orthodox in preaching and teaching by the minister claiming exemption. All methods of preaching and teaching of all religious groups done by their ministers was intended to be protected by the act.

C.

The terms of the act exempting men pursuing ministry as their "vocation" exclude consideration by the draft board or the court of time spent in incidental secular activities, as their "avocation."

Nothing is said in the act about the amount of hours or weekly or monthly time that may be devoted to some sideline or avocation by the exempt or deferred registrant. Judges when not at their work may run ranches or farms. Congressmen may have outside businesses. Others may pursue other avocations.

Only very few ministers of religion today are fully supported by their vocation. This has been true throughout the history of religion. The congregations are too poor to afford ministers all they require. That a poor preacher devotes part of his time, when not attending to his vocation of the ministry, to secular work does not take away his exemption. This secular work, like the outside financial activity of judges and other officials freed from military service, is wholly irrelevant. It may not be considered as basis in fact for denial of the exemption so long as it appears that the minister preaches for his group as his vocation.

Hold that the clergyman of a rich church is exempt. But the preacher of a poor church is not! Yet they both devote the same amount of time to their vocations. Is not this discrimination against poor religious congregations? Is not it unequal law in favor of the rich congregations who have big churches? Congress did not intend this. Time devoted to outside activities was never intended by Congress to be used to discriminate. The sole criterion is: Does the minister pursue the ministry as his vocation? If he does, then Congress intended him to be exempt. This is so regardless of what he does when away from his ministry.

D.

Congress had in view historical practices of religions whereby ministers of all denominations preach, not only from the pulpit, but also upon the streets and from door to door. Congress intended to include all kinds of religious preaching and not restrict it to any one practice, and especially that of the itinerant ministers who are the only source of religious instruction for over 70 million people in this country.

The act uses the term "as embodied in the creed or principles of such church, sect, or organization." This shows that Congress had in mind the history of religion. History of religion, especially of the Christian religion, shows that preaching has never been confined to the pulpit. It extends to ag-

gressive preaching in the streets, in the parks and from door to door. It includes preaching in the homes to many, when invited or with consent of different small groups. It covers any means or place where the good news of God's kingdom can be taught.

Both Biblical and secular writings show that the Christian church began with itinerant ministers. They preached to the people at the doors, in the homes and upon the streets. They spoke also to great multitudes at the seashores and in the market places. Ancient, medieval and modern history of the different Christian faiths shows that these primitive methods have never been abandoned. These methods of the Founder of Christianity are still ready instruments and potent forces of all the different religions.

A study of religious history shows that preaching is not confined to the use of the oral word. Preaching, in modern times, has reached out to include the written word. Books, booklets and pamphlets, containing written sermons, are the ready and effective instrument of the modern missionary, evangelist and minister. Congress had in mind protecting this method of preaching. There is nothing in the history or the act to show that it was not included.

All methods of preaching were included by Congress. Besides that, the ecclesiastical determination by Jehovah's Witnesses on the use of literature as an aid to or substitute for the oral sermon is binding on the Government. None was left out of the exemption granted by Congress.

E.

Benefits received by the federal Government from the work of all religion in this country were known to Congress and because of them Congress intended to reciprocate by giving to the words "vocation," "preach" and "teach" as broad a meaning as is reasonably possible so as to protect all religions.

The work of the itinerant minister, as well as that of the pulpit preacher, bears burdens that otherwise would fall

upon the Government. The value of the work these take off the shoulders of the Government cannot be estimated in dollars and cents. It is so very great that it calls for a reciprocal attitude of generosity and liberality from the Government toward religion where laws favoring religion are concerned.

This rule of generous construction applies to the construction of the act, enforcement of the exemption and the term "vocation" used in the definition of the term "minister of religion" appearing in the act.

II.

UNDER THE STATUTE AND REGULATIONS IT IS THE DUTY OF THIS COURT TO HOLD THAT THE ECCLESIASTICAL DETERMINATIONS MADE BY JEHOVAH'S WITNESSES ON WHERE AND HOW APPELLANT PREACHES IS BINDING ON THE DRAFT BOARDS, THE GOVERNMENT AND THE COURTS.

A.

The law frees all religious organizations from every governmental inquiry and judicial control of religious matters relating to the ordination of ministers and the manner and the place of their preaching.

Suppose Congress had not expressly provided that it was up to the judgment of each different religious organization to say what shall constitute the qualification of its ministers and the method of their preaching. Still it should be and the Court would read that right into the act.

Congress left all ecclesiastical decisions on qualification of ministers and method of preaching up to the religious organizations. This was done expressly. It said: "as embodied in the creed or principles of such church, sect, or organization."

Had Congress remained silent on such matters it would still be the same. The law of the land is that such issues are not for the Government. They are for the religious organization to decide. Their decisions are final, both under common law and under the Constitution.

B.

Under the act and the regulations the Government is not permitted to make an assault on the ecclesiastical decisions of any unorthodox and unpopular religious organization and deny rights under the act and regulations to a minister of that group by making an illegal invasion of the religious field reserved to the governing body of the church. It cannot fix tests of heresy. The Government cannot by law seek to compel religious conformity in violation of the above-stated rule of religious immunity and the commands of the First Amendment of the United States Constitution under the guise of enforcing the draft law.

Whether a religious group shall confine its membership to its ministry (as do all missionary societies) is a religious prerogative and decision that cannot be questioned by the Government. If a religious group decides to do its main preaching to the "lost sheep" (John 10:16), such as the 70 million nonchurch members in the United States, by going to them at their homes, then that is an ecclesiastical determination. It too cannot be questioned by the Government. That a religious group decides to concentrate its preaching methods on those used by the primitive Christian church —door to door, in the homes and upon the streets—so as to reach the poor rather than confine their preaching to the pulpit methods of the clergy of the rich churches, is also an ecclesiastical determination. It also cannot be questioned by the Government.

It is beyond the competency of this Court or the Government, according to the decisions of the Supreme Court, to question the religious practices of any group, so long as they do not violate the law of morals, break into overt acts against peace and order of the community or invade the property rights of others. To permit the Government and the Selective Service System to do here what the Supreme Court has said they cannot do would be to resurrect the heresy tribunals of the inquisition. Yet they are condemned by Congress and the Constitution!

C.

If the act and regulations are construed so as to allow the Government, the draft boards and the courts to invade the ecclesiastical decisions of religious bodies and apply principles of religious conformity in determining who is qualified as a minister then, as construed and applied, the act and regulations will discriminate and be in conflict with the First Amendment of the United States Constitution prohibiting the establishment of a state religion and forbidding the abridgment of any rights to freedom of religion.

It would be unreasonable to interpret the law so as to let the Government act as a religious censor of ministers and preaching by religious organizations under the act. This Court must not construe the law so as to make it unreasonable. To do what the Government wants done is to produce absurd consequences and injustice. It will produce unconstitutional results by discrimination between religious organizations. It would set up orthodox state-church principles in violation of the separation clause of the First Amendment. Also it would abridge the freedom-of-religion clause of that Amendment. The interpretation the Government asks this Court to give to the statute should be rejected.

III.

THE UNCONTRADICTED AND UNIMPEACHED DOCUMENTARY EVIDENCE IN THE DRAFT BOARD FILE SHOWED THAT APPELLANT PURSUED HIS MINISTRY AS HIS VOCATION. THE DENIAL OF THE MINISTERIAL EXEMPTION, THEREFORE, IS ARBITRARY, CAPRICIOUS AND WITHOUT BASIS IN FACT.

A.

The facts showed that appellant was a full-time minister, known as a "pioneer." He preached in his missionary field as his vocation.

Appellant showed that he was a recognized minister of a

recognized religion. He was engaged in the full-time missionary work of Jehovah's Witnesses, known as a "pioneer." This was sixteen months before his first classification on February 28, 1952. He showed he never had full-time secular work but that he was in the full-time ministry before his first classification.

The undisputed evidence showed that he had been ordained. It showed that he was preaching in accordance with the creed and principles established by the religious group that he represented. He met the requirement of the statute in every respect. His ministry was his vocation.

The local board knew that he devoted his full time to the work of his ministry. There was no dispute that he pursued the ministry as his vocation. The papers in the record before the board and the undisputed evidence showed this. There was no question of weighing evidence.

The denial of the exemption was without basis in fact. This is as much so as if he had shown, by undisputed evidence, that he was a judge, a congressman or a governor and then was denied the rights given to those offices. No fact question was presented to the court below. Only legal questions as to interpretation of the law and applying it to the undisputed evidence were involved. The denial of the exemption was without basis in fact.

B.

The performance by appellant of part-time work as a school bus driver incidental to his vocation of the ministry does not constitute basis in fact for the denial of the exemption as a minister of religion.

C.

That Hacker occupied another office as a minister in the organization of Jehovah's Witnesses, the presiding minister of the Chino, California, Congregation of Jehovah's Witnesses, incidental to his work as a pioneer minister, does not affect his vocation as a full-time pioneer minister of Jehovah's Witnesses.

D.

Nothing said by the Government about the status of appellant as a full-time pioneer minister prevents his classification as a minister of religion based alone on that activity.

The contention of the Government that appellant is a mere book peddler and not a minister should be rejected. The act rejects the argument. The doctrine of finality of ecclesiastical determinations of a religious organization established by the Supreme Court destroys the argument of the Government. The method of preaching by appellant was fixed by the doctrine and creed of Jehovah's Witnesses. It cannot be questioned. The choice and determination of the group under the act and the law of the land is final and binding upon the Government and the Court.

Other ministers of other religious organizations that confine themselves to preaching by distribution of literature, as colporteurs—as well as Jehovah's Witnesses—are exempted from training and service. This administrative determination should be adopted by this Court. If it is applied here the Government will be found to be properly out of court on its illegal contention.

The attack made by the Government upon the ordination ceremony of appellant and Jehovah's Witnesses was contrary to law. The attack was beyond the authority of the Government. The ecclesiastical determination by Jehovah's Witnesses as to the ordination ceremony for its ministers is binding on the courts. That it was identical to the ordination ceremony of Christ Jesus, his apostles, his disciples

and all the ministers of the early church left the Government without grounds to question it.

The documentary evidence submitted by appellant to his draft board that was prepared by other persons was sufficient. It corroborated his claim for exemption. The draft boards did not question it. They never rejected it. The board was satisfied with it. The Government has no authority to reject the documents. If they were satisfactory to the draft boards they cannot be questioned for the first time by the Government after the time to bring in stronger evidence had expired, since the board did not call for it.

The only place the documentary evidence submitted could be questioned was in the draft boards. This was the only tribunal where he could answer or offer evidence. The administrative tribunal did not call for stronger proof. It seemed to be satisfied with what he submitted. Now it cannot be contended (when he cannot answer *nunc pro tunc* and supply stronger evidence) that what documentary evidence he submitted was not sufficient.

Youthfulness of Hacker cannot be raised by the Government as basis in fact for the denial of the exemption. The act and the regulations do not make this an element of any exemption or deferment. It was never raised by the draft boards. It was not a factual basis for the denial. The act provided for an 18-year-old man to claim the exemption. Congress, therefore, closed the mouth of the Government. It has no right to rewrite the law and change the regulations fixed by Congress. The limit of authority of the Government was to read the law straight. It has no right to legislate new provisions in the law.

It is significant that even the local board (it actually saw Hacker) did not say anything about his youthfulness. The youthfulness is immaterial. If he was old enough to register under the act he was old enough to claim the benefits of exemption for ministers under the act. Congress settled the question. Youthfulness under the law is entirely moot to the case.

ARGUMENT

The denial of the ministerial exemption by the appeal board to the appellant is without basis in fact and the classification given to appellant is arbitrary and capricious.

I.

A PROPER CONSTRUCTION OF THE STATUTE AND THE REGULATION EXEMPTS ALL MINISTERS OF ALL RELIGIOUS ORGANIZATIONS PREACHING, AS THEIR VOCATION, THE DOCTRINES OF THEIR CHURCHES. THIS EXEMPTION PREVAILS REGARDLESS OF PART-TIME SECULAR ACTIVITIES PURSUED AS AN AVOCATION INCIDENTAL TO THEIR MINISTRY.

A.

A brief discussion of the legislative history behind the 1948 Act shows an intent to make the exemption broad and liberal.

The present act is similar to the regulations under the 1917 Act. (Selective Service Law of 1917, 40 Stat. 76, 50 U. S. C. § 226) It is slightly different from the 1940 Act. (54 Stat. 887, 50 U. S. C. App. §§ 301-318) The difference is that the 1948 Act adds to the 1940 Act the provisions of the Selective Service Regulations under the 1917 Act. The regulations under the 1917 Act required that ministers who pursued the ministry as their vocation be exempted by the law. They could not, however, be exempt by preaching as an avocation.—Selective Service Act of 1948, 62 Stat. 624, § 16(g), 50 U. S. C. App. § 466(g). Cf. 65 Stat. 87.

The ministerial exemption of the 1917 Act was commented upon in Congress when the act was considered. Spokesmen for the bill stated that the exemption was for a special purpose. It was to avoid taking the minister "away from his congregation." Congress intended to leave someone at home "to preach to the people, to bury the dead, and marry the youth of the land." (*Congressional Record,* Vol. 55, pp. 963, 1473, 1527) General Crowder, the Provost

Marshal General, gave testimony before the House Committee on Military Affairs. He said that the ministerial exemption was a legislative exemption. It was an exemption. He said it was not a deferment by the executive branch of the Government.—*Congressional Hearings,* 65th Congress, 1st Session, pages 94, 95.

The 1940 Act provided for the exemption of ministers of religion. There was no detailed definition in the act. (54 Stat. 887, 50 U. S. C. App. § 305) Section 622.44 of the Selective Service Regulations under the 1940 Act explicitly defined the terms "regular minister" and "duly ordained minister." They implemented the act. (32 C. F. R. § 622.44 (b))—See also *Cox* v. *United States,* 332 U. S. 442.

Congress intended in that act to provide for a very broad and liberal interpretation of the term "minister of religion." (See the letter of Congressman Martin J. Kennedy to the House Committee on Military Affairs.) There was a definite intent to exempt all full-time ministers, whether they were lay brothers, ministers performing administrative duties or clergy preaching from the pulpit.—See *Hearings before the Committee on Military Affairs,* House of Representatives, 76th Congress, 3rd Sess., on H. R. 10,132, at pages 299-305, 628-630.

General Hershey, Director of Selective Service, stated the attitude of Congress. He said there was "a natural repugnance toward any proposal for drafting ministers of religion for training and service." (*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 239, Washington, Government Printing Office, 1943) The purpose of the exemption appearing in the 1940 Act was stated by the United States Court of Appeals for the Second Circuit in *Trainin* v. *Cain,* 144 F. 2d 944 (1944). The reason was to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."—144 F. 2d at p. 949.

The above legislative history shows a national policy to exempt ministers. This policy was expressed in both the

1917 Act and the 1940 Act. This showed a broad and liberal exemption intended by Congress to protect ministers. Concerning the administration of the ministerial exemption under the 1940 Act, General Hershey, the Director of Selective Service, said: "The determinations of this status by the Selective Service System have been generous in the extreme."—*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 240, Washington, Government Printing Office, 1943.

It can be seen that Congress intended to be fair and liberal in its exemption of ministers of religion from military training and service.

B.

The 1948 Act shows a continuing congressional intent to give a broad and generous exemption to ministers, so long as the ministry is pursued by them as their vocation.

The only difference between the 1940 Act and the 1948 Act is that the 1940 Act did not require that the ministry be pursued as a vocation. The 1948 Act was specifically changed. It made the definition of a minister identical to the definition appearing in the Selective Service Regulations under the 1917 Act. The Report of the Senate Committee on Armed Forces stated that the definition of the terms "regular or duly ordained minister of religion" appearing in the act were defined in § 16(g). Concerning the definition the report said: "The definition is that which was contained in the 1917 Selective Service Regulations, and which was successfully administered without the problems which arose under the 1940 Act."—Senate Report No. 1268, 80th Congress, 2nd Session, page 13.

The indictment was returned pursuant to the provisions of Section 12(a) of the Universal Military Training and Service Act (50 U. S. C. § 462(a), 62 Stat. 622). Section 6(g) of the act reads as follows:

"Regular or duly ordained ministers of reli-

gion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title."—50 U. S. C. § 456(g), 65 Stat. 83.

Section 16(g)(1), (2) and (3) reads as follows:

"(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained min-

ister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. § 466(g) (1), (2) and (3), 65 Stat. 87.

Section 1622.43 of the Selective Service Regulations provides:

"1622.43 *Class IV-D: Minister of Religion or Divinity Student.*—(a) In Class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled."
—32 C. F. R. § 1622.43.

To be a "duly ordained minister of religion" under the Universal Military Training and Service Act, certain things must appear. First is that the person be ordained. Second

is that he be ordained in accordance with some religiously established discipline. Third is that he be ordained to preach the doctrines of a church or organization and to administer the ceremonies in public worship. Fourth is that he pursue his ministry as "his regular and customary vocation," preaching the principles of his religion and administering the ordinances of public worship of his church.—65 Stat. 75, 87, § 16(g), 50 U. S. C. App. § 466(g).

A "regular minister of religion" under the act is also defined. Congress says that a man is a "regular minister of religion" when he teaches the principles of his religion without having been formally ordained. (65 Stat. 75, 87, § 16(g), 50 U. S. C. App. § 466(g)) Congress in this section specifically limits the definition of the term "regular or duly ordained minister of religion." It says that it does not include a man who preaches incidentally the principles of his church, either as a regular or duly ordained minister. Congress adds that it does, however, include every minister who preaches, either as a duly ordained minister or as a regular minister, the principles of his church "as a vocation."

Please notice that Congress in the report of the Senate Committee on Armed Service stated that the exemption was limited to the "leaders of the various religious faiths, and not for the members generally." (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) It is plain from this report that Congress intended to exclude those who were not full-time ministers or not leaders of religion. Congress intended to exclude all the laymen but none of the full-time ministers.

The word "leader" used in the Senate report must be specifically qualified by the definition of "minister of religion" appearing in the act. The definition in the act specifically exempts a minister who preaches his religion as his vocation.

The use of the word "leader" in the Senate report appears to be irrelevant to the act. This is especially true since the report specifically adopted the definition appear-

ing in the act. The definition is clear. It is not ambiguous. There is no indefiniteness in the terms of the act. It does not use the word "leader." Since the definition is clear and not vague, the word "leader" used in the report cannot be read into the act, unless "leader" is synonymous to the words "minister of religion." A man who pursues his ministry as his vocation may properly be said to be the "leader" in his religion. This is so regardless of the name or nature of his denomination and where or how he preaches.

The word "leader" alone used in the report of the Senate Committee on Armed Service (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) may not be used to qualify or to abridge the definition appearing in the act. One reason is that the report adopted the definition used in the act. It made the term a part of the report. The other reason is very well expressed by the Supreme Court in Ex parte *Collett,* 337 U. S. 55, at page 61.

The Government cannot limit the word "minister" in the statute to a minister who preaches from the pulpit to a congregation of laymen under one roof. This is an illegal rewording of the statute. It excludes the ministers preaching the doctrines of their churches as their vocation and who have congregations under many roofs or no roof, the open street.

Today, as throughout history, many ministers are missionaries and evangelists. They have congregations only in the homes of the people. There they minister to the spiritual needs of their missionary flocks.

There is also the street preacher. His congregation is rarely, if ever, composed of "members" of his church. It is never fixed. The definition the Government gives the Court would exclude these thousands of ministers in the United States.

A reasonable reading of the act does not permit this clouding of the congressional intent. Congress certainly intended to protect the full-time minister of every religious organization. This is true even though he never preaches to

a fixed congregation anywhere. It is not necessary that the listeners be members. The people hearing him may be non-members of his church.

This broad interpretation is proved by the protection in the act for leaders who are executives in religious organizations. Congress intended to protect administrators of every religious organization. These administrators are either ordained or regular ministers. They rarely (if ever) preach. They have no congregations. Yet they are "ministers" or "leaders" in their churches. They are administrators of their churches. This is also the case where bishops and archbishops of the Catholic Church and the Anglican Church are involved.

The practice of many churches is to have clergymen or ministers performing administrative functions. They also teach in colleges. Do these men, therefore, cease to be exempt as ministers because they are not regularly serving a congregation? In neither case would the men serving in that capacity lose the protection of the statutory exemption. In short, every church has the right to have ministers. It should be free to appoint them to whatever function they are needed within the organization. If the regular minister of one church places men in functions different from some other religion, the law is not concerned. The law will not tell the various denominations how to operate their internal affairs.

Lay brothers of the Catholic Church are not priests or "ordained" ministers. None has a congregation. None preaches from the pulpit. As a class, as regular ministers, they perform duties of a menial nature. They are not executives. They are "administrators" of the lowest type in the Catholic Church. They never conduct religious services or perform any religious rites of any kind of a sacerdotal nature in the church.

Never do the lay brothers perform any act that is a part of all religious services in any Catholic Church. They are "unable to attain to the degree of learning requisite for

holy orders," but are "able to contribute by their toil" and are "able to perform domestic services or to follow agricultural pursuits."—See *The Catholic Encyclopedia,* Vol. 9, p. 93.

Lay brothers are regular ministers of religion under the act. See *State Director Advice 213-B,* as amended September 25, 1944, National Headquarters Selective Service System.

Special emphasis should be put on the term "regular minister of religion" used in the act. This shows an express intent on the part of Congress to protect all full-time ministers, regardless of whether they preach under one roof to those who are members of their church or not. The term "regular minister of religion" is a saving clause for religions. This term was included for the express purpose of protecting all ministers of religion who are not "ordained" ministers of religion.

The term "regular minister of religion" was declared by General Hershey, the Director of Selective Service, to be a very broad and generous term.—*Selective Service in Wartime, supra.*

His administrative interpretation of the term was adopted in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.), at page 638.

One difference (respecting exemption of ministers) was made by Congress between the 1940 Act and the 1948 Act and current Act. It was the requirement that to be exempt the minister of religion pursue his ministry as his vocation. Congress, by the use of the word "vocation," precluded the possibility of any minister who pursued full-time secular work from being classified as a minister, when it appeared that he preached only part time. Congress intended by the use of the word "vocation" to protect only those ministers who made their ministry their main job.

The only criterion Congress imposed upon each such minister was that he pursue his ministry as his vocation. When the minister shows that preaching is his vocation, there is only one answer. He is a minister of religion ex-

empted under the act and regulations. The exemption comes even if he has no cathedral. He should be exempt even if he is without a congregation under one roof. He is exempt when he shows that his ministry is his vocation. His vocation of the ministry makes him a "leader" in his organization. As a leading minister of his group he pursues his work as his vocation. He has been exempted by Congress.

C.

The terms of the act exempting men pursuing ministry as their "vocation" exclude consideration by the draft board or the court of time spent in incidental secular activities, as their "avocation."

The only thing the act requires the minister to show is that the ministry is his "vocation." Nothing is said in the statute about activities he carries on when not preaching. The law allows him to have a sideline. He may have several different interests outside his vocation. These interests often require much of his time not devoted to his vocation. The act exempts the minister because his ministry is his vocation. Then no consideration may be given to time devoted to incidental outside activities, so long as the ministry is his vocation.

To demonstrate the error of the Government's argument (that *incidental* secular work can be the basis of the denial of the exemption) consider other deferments. There are deferments for governors, members of the state legislatures, congressmen, senators and judges of courts of record. (50 U. S. C. App. § 456(f), 32 C. F. R. § 1622.41) There are others. Mention of these is enough. In the act and the regulations granting exemption and deferments nowhere does it appear that the incidental time devoted to outside activity is made a basis for the denial of the exemption or deferment.

A judge may live on a farm and run it. In his spare time he may operate a ranch. Both of these jobs take much time

when the judge is not on the bench. A congressman or a senator may have some commercial business on the side. Many exempt or deferred persons may spend much time attending to investments. They may watch the stock market reports to judge what to do with their securities. This may take much time. Even a wealthy deferred person who has no need to run a ranch may devote his time away from his vocation to playing amateur golf or to the breeding of horses. He may devote much time to such pursuits when not engaged at his vocation. A congressman may devote much of his spare time to polo playing. This may take all of his time when not working at the job that deferred him from training and service in the armed forces.

A governor may spend his spare time running a coal business. He may engage in playing bridge professionally when not occupied with his duties as governor. In neither case would that be even remotely relevant to his right to deferment, which hinges on his vocation.

It is well known that in some Washington circles certain senators, congressmen and other governmental employees spend many hours weekly at social gatherings and parties. This they do often when out of their offices, during the week and on week ends. The fact these persons devote such time to help them climb up the slippery slope of politics (among other probable reasons) does not in any way affect their deferred status under the draft law. That is dependent upon the vocation which they pursue and not their sideline pursuits.

Recently the public press reported about an ordained minister who has gained world fame as a track star. He has devoted much time to training and participation in amateur competition. By the use of his time outside the ministry he reached the highest of athletic honors, the Olympics. Surely no one would dare say that, because he devoted much of his time when not preaching to training for track competition, such defeated his claim for exemption based on his vocation of the ministry.

A wealthy clergyman may devote all his spare time to caring for investments and collecting rental on real estate. This in no way takes his exemption from him. The only criterion is: does the minister pursue his ministry as his vocation? It is not: what does he do with his spare time?

A poor preacher of a financially weak congregation often is required to perform secular work to support himself incidental to his vocation of the ministry. Does this bar him from claiming the exemption as a minister of religion? Not as long as he regularly and customarily teaches and preaches, as his vocation, the doctrines and principles of a recognized religious organization.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week. This they must do as a sideline in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work. Yet, as his vocation, he regularly and customarily teaches and preaches the doctrines and principles of his church as a minister. Upon this point "a page of history is worth a volume of logic."—Mr. Justice Holmes, *New York Trust Company* v. *Eisner,* 256 U. S. 345, 349.

From time immemorial the support of a preacher or minister has not been confined to aid from a congregation capable of supporting him financially. The poor financial condition of the congregation makes it necessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, are forced to work on farms. They also work in rural stores and at other secular work to support themselves and their families. This they must do so that they might regularly and customarily preach to their congregations.

The source of a minister's income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain him is not relevant. Whether

he is fortunate, is rich and able to maintain himself from stocks, bonds and property investments is not material. Also whether the minister, like most ministers, may not be financially independent is not material. He may have to depend on his labors for his support. That is also immaterial.

General Lewis B. Hershey, Director of Selective Service, stated in 1944:

> "In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work."—*State Director Advice 213-B,* as amended September 25, 1944, National Headquarters, Selective Service System.

A very large number of ministers of Protestant and Jewish denominations depend for their support upon secular work. In the Northern Baptist Convention twenty per cent of all clergymen in rural sections "help earn their keep by work not connected with their churches."—Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention,* p. 72, Philadelphia, Judson Press, 1945.

Twenty-four per cent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary from their respective churches, of which fourteen per cent received less than $99 annually. "There is nothing to indicate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." —Landis, Yearbook of American Churches, 1945, Federal Council of Churches of Christ in America, Lebanon, Pa., Sowers Printing Co., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons) and Mennonites are not supported by their churches. They and thousands of other ministers of other poor churches are dependent entirely

upon secular work for their support. No salary is paid to a large percentage of all American ministers.

It is outrageous to presume that Congress intended to discriminate between the wealthy clergy and the poor ministers. The wealthy clergyman can be exempt although he may spend many hours playing golf and bridge and engaging in extrasectarian activity during the week. He has a wealthy congregation that prevents him from having to work to support himself. The poor congregation and minister not thus blessed must suffer the penalties of the law. Because he uses the same amount of time working on a secular sideline that the wealthy clergyman uses attending to secular investments so he may stay in the vocation of the ministry, the poor preacher loses his rights!

Surely Congress did not intend to discriminate in favor of the rich and against the poor churches in this country. The poor, small churches in this country outnumber, many times, the wealthy. Congress must have had clearly in view the fact that to protect the churches of the poor it was necessary to allow their ministers pursuing the ministry as their vocation to engage in some sort of secular sideline. They have to have some secular work as an avocation to sustain themselves.

With the knowledge of these facts, surely it must be said that Congress intended to exclude from the consideration of the court and the draft board completely the secular sideline of the ministers unless secular work was the minister's vocation.

When secular work is the avocation, then regardless of such secular work as a sideline there is no basis in fact for the draft board classification denying the exemption based on the vocation of the ministry.

In determining whether there is basis in fact for a draft board determination the draft boards are limited as to what to consider. A claim for exemption or deferment under the act cannot be denied solely by a finding that the minister had other activities on the side. These would not,

within themselves, deny such person his exemption or deferment. Suppose the facts establish that such minister comes within the exemption under the act. His incidental side activities or secular avocation are wholly irrelevant and immaterial to his exempt status.

Let the Court again be reminded of the determination of the law that draft boards and Selective Service officials have no right and duty to deny exemption because of the part-time activities of those who make the ministry their vocation. If the officials can do this inquisitorial act to one organization, they can do it to all of them. Selective Service officials will become an army of religious spies following all preachers around to find out how much time they play golf and how long the wealthy ones spend checking on securities, collecting rents, writing books or other such activities.

The Court then must prepare itself to try the activity of every lay brother who looks after cattle or makes wine at a monastery, of every priest who helps print or censor propaganda, every minister who teaches at a theology school or who acts as registrar or administrative officer of such institution. It would put on the Selective Service System the burden of spying and snooping into the life of every minister.

If it is illegal for a minister to have a part-time avocation of a secular job, then it is equally illegal and destructive of his exempt status if the minister has an avocation of playing golf, operating a farm or engaging in athletic contests.

If devoting time to an avocation destroys the exemption of a minister, then the draft officials will also have to spy on senators operating a private law practice, judges playing bridge and congressmen going to cocktail parties. Instead of public servants in a free country the Selective Service System will become a new gestapo! Ridiculous you say? It is just as ridiculous as the poisonous argument the Government has put in a capsule to feed this Court.

—See *Dickinson* v. *United States,* — U. S. —, decided by the Supreme Court on November 30, 1953.

It is respectfully submitted that Congress intended not to permit the courts or the draft boards to nullify the intent expressed in the word "vocation" by an inquiry into the slight and inconsequential time devoted to the secular avocation of this minister of religion.

D.

Congress had in view historical practices of religions whereby ministers of all denominations preach, not only from the pulpit, but also upon the streets and from door to door. Congress intended to include all kinds of religious preaching and not restrict it to any one practice, and especially that of the itinerant ministers who are the only source of religious instruction for over 70 million people in this country.

Many different methods and customs of preaching will be found exposed in the pages of history. From the first organization of the Christian system through the medieval period down to modern times this appears. Any well-informed student of church history knows that there has never been any fixed or consistent form of preaching or religious practice.

The records of the nations run red with blood because of those who sought to impose fixed religious standards upon their victims. These bloody tragedies of history, such as the Thirty Years' War and the evils of the Inquisition, were preludes to constitutional guarantees of religious liberty. The Constitution refuses to allow Congress or anyone else to establish by law or administrative fiat any form of religion, as fixed or government approved. Congress knew these things. That knowledge of religious history is reflected in the act. The refusal of Congress to define any set mode of preaching or manner of appointing ministers or where they shall preach is significant.

Congress did not brush aside this religious history of

the world. That Congress did not say what was "preaching" and "teaching" proves that it had in mind the different methods of preaching shown in the history of the Christian church.

Congress knew the history of all the present Christian religious denominations in the United States. It knew their background. Knowledge of historical practices and customs of the early Christian church, the medieval church and the modern church was in view of Congress when the law was written. It was well informed on religious history. Congress knew that there could be no fixed religious belief or religious practice. Congress knew all are different. It had in mind making the law broad enough to cover all methods of religious preaching of all denominations. Congress intended to act in harmony with the Constitution and the practice of toleration shown by the history of this country.

A brief review of some of the early history of the Christian religion shows clearly the type of religious practice Congress must have had in mind when the exemption was written into the act.

The Scriptures show that the apostles and disciples of Jesus preached publicly on the streets and also from house to house. (Acts 20:20) The apostles and disciples of Jesus taught in this manner throughout the Mediterranean world. Jesus commanded his disciples to "teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost." (Matt. 28:19) No informed person or Bible scholar will dispute that the church of Christ refused to confine their preaching to the temple. They went into the highways and byways.

Jesus "went round about the villages, teaching." (Mark 6:6) Three times he made trips through Galilee. He also went into other parts of Palestine. No one will deny that the "Sermon on the Mount" was not delivered in a cathedral. It was preached in the open air.

In addition to the large open-air audiences to which Jesus preached, he also preached in the homes and by a

public well. He sent out seventy evangelists to preach through Judea. (Luke 10:1) Thousands of disciples of Jesus likewise preached publicly and in the homes of Jerusalem. They were led by Paul, Barnabas, Timothy and other disciples.—Acts 5:42.

From the very earliest period the Christian church had an itinerant as well as a local ministry. Both were recognized as vital in the establishment of the faith. All were recognized as ministers. The itinerants were officials in superior positions to those of the local ministry. The local ministers were chosen and appointed by the itinerants. Paul gave instructions to the young man Titus who was a traveling minister: "For this reason I left you in Crete, that you might correct the things that were defective and might make appointments of older men in city after city, . . . " —Titus 1:5, *New World Translation.*

No one can contend that the pulpit-in-cathedral preaching method since that time—regardless of how orthodox it may be—now has a position superior to the primitive method pursued by Jesus and his apostles. It is unreasonable to assume that Congress intended to condemn the primitive practices of Christ, his apostles, and the disciples.

Congress knew of the great part played by such itinerant ministers in American and English history. It certainly did not intend to discriminate against them.

Congressional intent to include all methods of preaching of all religious organizations is shown in the use of the term "as embodied in the creed or principles of such church, sect, or organization." This quoted term appears in the definition of the term "minister of religion" appearing in the act. Had Congress intended to limit the type of preaching protected or restrict the exemption to the popular religions it would not have used the word "such."

This matter is more particularly explained in the House Report No. 2438, Report from the Committee of Conference, to accompany S. 2655, the bill that became the 1948 Act. On

page 48 of the report it is shown that Congress intended not to limit the term or exclude any method of preaching.

The itinerant ministry is associated with the works of some of the greatest English and American clergymen and reformers. Wesley, Calvin, the Jesuits and many other important religious reformers have used house-to-house ministers to advance their religious endeavors.

It is now too late in the day to say that such ministry is not a recognized part of the religious life of the English-speaking world. It is well known and is protected by law.

Congress has provided for the regular or duly ordained ministers of all religions. It did not say: 'any religious denomination that has one minister attached to one congregation.' To say so would be to establish a state church of orthodoxy and deny the rights of those who have played an influential and useful part in the history of the nation. Congress has not so limited the statute and certainly this Court should not do so.

The practice of having an itinerant ministry as well as a pulpit ministry has a long and historically honorable record. Congress knew this. It must be deemed to have made a reasonable provision for such religious practices, the same as it did for other forms of religious preaching. The basic purpose of the exemption to give the influence of Christianity and its moral effect to the people has been shown. It has been very effectively served by such ministers. It would sabotage the true purpose of Congress not to allow ministers doing this very useful work to receive the protection contemplated. The itinerant ministers of the nation are engaged in a ministry that reaches a great class of people not otherwise touched by Christian pulpit preaching. In this activity they are entitled to the benefit of the statute designed to protect such activity and to save for the people the helpful influence of such works of charity.

Few, if any, orthodox religious pulpit clergy preach in the streets or at the homes. They depend upon the people

coming to them. They do not go to the people with the Word of God.

Suppose that all churches should become vacant. Assume the congregation leaves the minister in his cathedral without an audience. Then there would be a clear and present necessity of a back-to-the-church movement. The only way that the orthodox clergy could revive the people or get them back to church would be to preach from door to door. They would have to preach primitively as did the Lord Jesus Christ and his apostles.

The orthodox clergy in the pioneer days in this country actually called from house to house. They preached publicly on the streets in order to establish their churches in this nation. Even to establish a new church in a new community today it is necessary to seek converts or attendants at church by calling from door to door. It is, therefore, proper to assume that Congress had in mind this ancient and primitive method of preaching as a necessary means to preserve religion in this country.

Surely the regularly ordained clergyman with a congregation of lay members would not cease to be a clergyman because his flock quit coming to church. He would be exempt if he preached his sermons as did the Lord Jesus Christ and the apostles from door to door. Certainly the Government would not have the audacity to contend that if he did preach thus (after losing his congregation) he would lose his exemption as a minister of religion, because he was not preaching from a pulpit to a crowd gathered in his temple or cathedral.

The place in history of public preaching has been judicially recognized in the Scottish case, *Hutton* v. *Main,* (1891) 19 R. (J.) 5. Lord Justice Clerk said:

> "Street preaching is a familiar thing. Respectable persons gather, sing in order to attract the attention of those near, and thereafter preach to them. Other meetings in the open-air within burgh are equally free and informal."

The practice of preaching publicly from door to door is as old as the history of the Christian church. It has continued through the Middle Ages down to modern times, a potent force in religious endeavor. The Supreme Court has found that orthodox as well as unorthodox denominations have used it effectively. That Court has said that such practices have the same high estate under the American Constitution as preaching in churches and cathedrals. (*Murdock* v. *Pennslyvania,* 319 U. S. 105, 109) They have been an effective and potent force in the religious life of the nation for centuries.

That religion should be confined to the cathedrals, temples, church buildings and other privately-owned edifices flouts ancient and modern history. It also defies the religious need of the people of this nation. There are 70 million in this land who do not belong to any religion or attend church. —Landis, *Yearbook of American Churches,* 1952, p. 234.

Among the millions of church members there are millions who do not attend church. How would these millions of persons who do not attend church be comforted in sorrow, spiritually fed or educated by the Word of God if it were not brought to them by the evangelist at their homes?

The people would be left godless and without a knowledge of God's purposes were it not for the missionary evangelist. He takes the Word of God to these lost sheep by calling upon them at their homes. Also he preaches to them publicly on the streets. There is a clear and present necessity of legal protection of these millions by exempting the missionaries and evangelists who are willing to take religion to these people. The people have failed to take to religion. This is through failure to go to the religious edifices to be educated.

This modern need of the itinerant minister to keep up the religious morale of the people is well stated by J. Benson Hamilton, who said:

> "For reasons that need no explanation a large class of our people have a prejudice against our

> churches. They will not attend divine service in them whatever may be the attraction. To such the gospel must be preached by the way-side, on the street corner, at the sea shore, in the mountain, in the woods."—*Empty Churches and How to Fill Them,* p. 64 New York, Phillips and Hunt, 1879.

The evangelist and missionary doing ministry work in the homes of the people in this land are meeting the needs of these millions. The itinerant ministers do as much as, if not more, to maintain the morale of these many millions of churchless people than do the clergy with a numbered flock of members who speak from the pulpit.

The argument that worship is confined to church buildings is devastating to all religion. It is contrary to the Constitution. It defies the clear intent of Congress to be liberal and fair to all religions in the enforcement of the act. History and the need of millions for the service of the door-to-door evangelist, therefore, support the proposition that Congress must have had in mind the protection of the work of all ministers, peripatetic as well as pulpit, under the statute.

E.

Benefits received by the federal Government from the work of all religion in this country were known to Congress and, because of them, Congress intended to reciprocate by giving to the words "vocation," "preach" and "teach" as broad a meaning as is reasonably possible, to protect all religions.

The preaching activities of ministers of religion and evangelists bear burdens that ordinarily fall on the Government. They do work of an eleemosynary comforting nature. The Government would be required to do this if there were no religions. The Government would be required to impose additional taxes. It would have to make heavier demands

on all the people. It might have to draft people to do the work of charity. Christian preaching to the people of this land does what the Government could not possibly do.

The value of the moral restraints placed upon the people by the work of ministers and evangelists cannot be limited. An invaluable sense of personal duty to principles of justice and righteousness results from the work of ministers of all religions. It is not confined to the general populace. Politicians, officials of government and all public officers are constantly reminded of this sense of responsibility to these principles that comes from preaching.

If democracy is to last, ministers must be kept free from compulsory military service. The dry-rot of internal corruption has destroyed some of the greatest nations on earth because of lack of Christian principles. Preaching and proselytizing the people through the Word of God is an insurance against barbarism and disintegration of the nation.

Godless communism, which makes the worship of the state the religion of the people, condemns the exemption of ministers of religion from military service. But such is not the concept of this democratic state.

The Government cannot treat the work of house-to-house missionary evangelists as a matter of no great moment. Their work is a matter of national importance that contributes to the welfare of the nation as much as the work of the orthodox clergy preaching from the pulpit. Their charitable works "constitute not only the 'cheap defense of nations,' but furnish a sure basis on which the fabric of civil society can rest, without which it could not endure." —*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 193.

Exemptions in favor of religion have always been given a broad and liberal interpretation.—*Trustees of Griswold College* v. *State,* 46 Iowa 275; *Watterson* v. *Halliday,* 77 Ohio St. 150, 82 N. E. 962; *Mattern* v. *Canevin,* 213 Pa. 588, 63 A. 131; *Congregational Society of Town of Poultney* v.

Ashley, 10 Vt. 241, 244; see also *Saskatchewan Ruthenian Mission* v. *Muldore,* (1924) 2 D. L. R. 633, 635.

It is respectfully submitted that the exemption in the statute should be construed liberally to give all ministers who pursue the ministry as their "vocation" freedom from service. To interpret the statute so as to cover only the orthodox clergy, and not the evangelist and missionary, is to discriminate. This would violate the principle of "equal justice under law."

II.

UNDER THE STATUTE AND REGULATIONS IT IS THE DUTY OF THIS COURT TO HOLD THAT THE ECCLESIASTICAL DETERMINATIONS MADE BY JEHOVAH'S WITNESSES ON WHERE AND HOW APPELLANT PREACHES ARE BINDING ON THE DRAFT BOARDS, THE GOVERNMENT AND THE COURTS.

A.

The law frees all religious organizations from every governmental inquiry and judicial control of religious matters relating to the ordination of ministers and the manner and the place of their preaching.

From the very beginning of the common law a realistic approach to the enforcing of statutes involving religious organizations has been made. Read *Thornton* v. *Howe,* 31 Beavin 14. In that case Sir John Romilly said that the law makes "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another."

After the Civil War it was held in *Watson* v. *Jones,* 13 Wall. (80 U. S.) 679, that it was beyond the competency of the courts or any governmental agency to inquire into ecclesiastical determinations made by a religious organization.

See the comment of the Supreme Court on this holding recently in *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, at page 116.

Some time after the decision in the case of *Watson* v. *Jones,* 13 Wall. (80 U. S.) 679, the Supreme Court decided *Gonzalez* v. *Archbishop,* 280 U. S. 1. In that case there were involved rights to a chaplaincy under a will. The point for determination was whether he possessed the qualifications as heir. The Court held that the qualification order of the church was beyond question by anyone other than the ecclesiastical hierarchy making the decision.—See 280 U. S., at pp. 16-17.

More recently the Court decided in *United States* v. *Ballard,* 322 U. S. 78, that the truthfulness of religious doctrines and practices is not subject to review by either the judge or the jury. This statement was made in a prosecution under the Mail Fraud Statute.—See 322 U. S., at pp. 86-87.

It is not for this Court or the draft boards to enter the religious field. They may not inquire whether the religious organization and its ministers are conducting themselves according to orthodox standards. The decision by a religious body as to the method of preaching by its ministers and their qualifications is final. This decision, however strange and unorthodox it may be, is unquestionable by the courts or the draft boards.

The order by a religious missionary organization, to have no laity members but to confine its membership to only its itinerant ministers, is final. It is not subject to any kind of attack by any governmental agency. It is the duty of the courts and the draft boards to recognize and give effect to the decision of the legal governing body of a religious organization. On all religious questions involving a registrant who is a minister of that organization, the decisions are final.

The only question for decision of the draft boards or the courts on judicial review in draft prosecutions is whether or not the minister pursues his ministry as his vocation and not incidental to some full-time secular job. Neither the courts nor the draft boards are authorized to

go beyond that question and conduct a heresy trial on the propriety of the religious training, beliefs and practices of the registrant and the religious organization of which he is a minister.

B.

Under the act and the regulations the Government is not permitted to make an assault on the ecclesiastical decisions of any unorthodox and unpopular religious organization and deny rights under the act and regulations to a minister of that group by making an illegal invasion of the religious field reserved to the governing body of the church. It cannot fix tests of heresy. The Government cannot by law seek to compel religious conformity in violation of the above-stated rule of religious immunity and the commands of the First Amendment of the United States Constitution under the guise of enforcing the draft law.

The Government may not turn the internal practices of a religious organization inside out. It may not compare them with the more orthodox practices of other churches. This leads to discrimination. The acceptance by this Court of that contention would result in the Court's setting itself up as a religious hierarchy. The Court then would be left without any standard to choose in determining what is right.

There is no one single standard that can be found for orthodoxy among the religions. Among the hundreds of different religious organizations in America there can be found no single norm of conformity. All are different. None conforms to another. The Government and the Court would be taken back into the inquisitions of the Dark Ages. The law would be changed so as to resurrect the ancient and iniquitous practices of test oaths. There were instruments of terror used by the religious inquisition of the Dark Ages.

If the draft boards and the courts were permitted to employ any one of the many different standards of orthodoxy to be found among the popular religions it would re-

sult in terror. Discrimination would be rife throughout the land. In a Catholic territory the Protestant minister would be denied exemption. A Protestant community would deny the Catholic priest his rights. Even the most orthodox would be in jeopardy in many communities.

Every time a change in the personnel occurred in a government agency, there would likely be a change in religion of the government agent. If the Government's practice be approved by this Court, then, instead of having government by the act and the regulations, the people will be governed by men and religion. Rights under the act would differ according to the swing of the pendulum, as the religious complexion changed with the appointment to government agencies.

In *Adelaide Company of Jehovah's Witnesses, Inc.* v. *Commonwealth of Australia,* 67 C. L. R. 116 (1943), the High Court of Australia said:

> " . . . it should not be forgotten that such a provision as S. 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities. . . . It is not for the court upon some *a priori* basis to disqualify certain beliefs as incapable of being religious in character."—67 C. L. R., at p. 128.

It has been held that if the courts were permitted to inquire into religion, then "we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507) Many cases have declared that all religions, Christian or pagan, stand equal before the law. (*Donahoe* v. *Richards,* 38 Me. 379, 409; *State* ex rel. *Freeman* v. *Scheve,* 65 Neb. 853, 879) It has been held that the doctrine of government inquiry into the ecclesiastical practices and ap-

pointments of religious organizations is contrary to "the spirit of religious toleration which has always prevailed in this country" and can never get a foothold so long as the government is forbidden to decide what religion is the true religion.—*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885.

In Ex parte *Cain,* 39 Ala. 440, the Supreme Court of Alabama had before it the case of a part-time minister who had a full-time secular job. He claimed exemption under the Conscription Act of the Confederacy. The same argument was pressed upon that court that the Government has advanced in this case. The court refused to pass upon the ecclesiastical determination. It said,

> "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Cain belonged to a sect of religionists who performed religious labor gratuitously."—P. 441.

The policy of the Government, being compelled by law to keep its hands out of the internal affairs of religious organizations, is well expressed in a Kentucky case. (*Klix* v. *Polish Roman Catholic St. Stanislaus Parish,* 118 S. W. 1171) The court said:

> "It would be tyrannical to coerce the different religious communions into the adoption of one rigid type of church government . . . ; and we do not see that the weal of the public in this commonwealth would be threatened by tolerating different kinds of church government any more than it has by tolerating different creeds and devotional rites."—118 S. W., at p. 1176.

The rule is very well stated by the Ontario Court of

Appeals. In the case styled *McPherson* v. *McKay,* (1880) 4 O. A. R. 501, Mr. Justice Patterson said:

> "The functions of a Court of law exclude the discussion of the doctrines, government or discipline of voluntary religious associations, except when they become elements in the adjudication of controversies respecting property, contracts or other civil rights."

In this case that is now before the Court there is no internal controversy subject to review. The Court has no lawsuit over property or contract; no civil rights are involved. There is no ground to go inside the organization.

Recently the Supreme Court reconfirmed the principle of law here contended for. It was in the case involving one of Jehovah's Witnesses. In *Fowler* v. *Rhode Island,* 348 U. S. 67, the Attorney General of Rhode Island attempted to get the court to decide that the giving of a public discourse in a public park was not religious services. The Court unanimously refused to grant the request of Rhode Island. —See 348 U. S., at pp. 69-70.

The Supreme Court went on to hold that if it did decide ecclesiastical questions by comparing Jehovah's Witnesses with other orthodox denominations, "the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function" as that performed by the more orthodox ministers.—348 U. S., p. 70.

Even in draft prosecutions all religious organizations from the outside look the same to the law. The Court must use the spectacles of the law. It can not put on glasses colored by any religion when it views Jehovah's Witnesses. Such an argument would close the door of exemption in the act on religion. By comparing one religion with another governmental agencies would become terror tribunals of conscience. The Court should not be led into a blind alley of religious inquiry. A multitude of ecclesiastical problems

will open up if such argument is followed. These questions are beyond the competence of draft boards and the courts. This is true as a matter of law. It is more true when viewed as a matter of learning. Very few if any secular judges are skilled in ecclesiastical matters as they were in times of old.

In ancient times the clergy were the judges. Now the judges are not the clergy. They lack the competence of the clergy on religious questions. In fact the law makes even the clergy incompetent to judge other ministers under the American system of government. This freedom stops the mouths of all persons.

No minister can question the propriety of another minister's religious practice or belief even though he be registered under the draft act. (*United States* v. *Balogh,* 157 F. 2d 939 (2d Cir.); vacated 329 U. S. 692; reversed on other grounds on rehearing 160 F. 2d 999 (2d Cir.)) All such religious questions are made irrelevant to inquiry under the draft law either before the draft board or the court. —*United States* v. *Balogh, supra.*

It must be remembered that the law laid down by this Court does not apply only to Jehovah's Witnesses. It will be a mandate by the Court to the Selective Service System to be enforced against all denominations. Let the Government, the courts and the draft boards be permitted by law to invade the internal practices of all religions! Ridiculous! Then such officials must make a detailed ecclesiastical inquisition into the practices of all the more than two hundred and fifty denominations in the United States. Any religions, or ministers, who do not come up to some unnamed and undefined ecclesiastical norm, in the view of the officials, will be denied legal protection by the Government inquisitors.

Many other minority and unpopular groups besides Jehovah's Witnesses would be denied their rights. Majority organizations also could be crucified. Why? They do not have any consistency of practice. The Government's argument must be carried to its logical conclusion in order to

test its validity. Cannot everyone see the indescribable maelstrom of confusion and evil that will result if the Government is allowed to prevail in this heresy-hunting argument? This sophistry of the Government is subversive of the Constitution that protects internal religious decisions from question.

The Government's effort may well lead the popular religions to an interesting parallel in history. A high government official of Persia was also afflicted with religious intolerance. He prepared a gallows upon which to hang a minister, a Jew. His scheming backfired on him. He was hanged on his own gallows that he himself built for the minister. The name of this official was Haman. The account of his downfall appears in the Bible, Esther, chapters 5 to 7.

The training of the minister, his appointment or ordination to preach and his preaching are ecclesiastical determinations. They are binding upon the Government. They must be accepted by the draft boards and the courts. The only question left open by the statute and the regulations is whether the minister is pursuing his ministry as his vocation and not incidental to a full-time secular job.

III.

THE UNCONTRADICTED AND UNIMPEACHED DOCUMENTARY EVIDENCE IN THE DRAFT BOARD FILE SHOWED THAT APPELLANT PURSUED HIS MINISTRY AS HIS VOCATION. THE DENIAL OF THE MINISTERIAL EXEMPTION, THEREFORE, IS ARBITRARY, CAPRICIOUS AND WITHOUT BASIS IN FACT.

A.

The facts showed that appellant was a full-time minister, known as a "pioneer." He preached in his missionary field as his vocation.

In his questionnaire appellant showed that in addition to working part time driving a school bus he worked as a minister. He showed that he was duly ordained. (10, 11-12)

He submitted an abundance of corroborative material showing he had been properly trained for the ministry, properly ordained and duly assigned to act as a full-time minister and presided over a congregation of Jehovah's Witnesses. (18-25) Nothing appearing in the memorandum made upon the personal appearance contradicts or questions the undisputed facts submitted to the board by appellant. (35) There is no contradiction of any of the statements appearing in the file that he is a full-time duly ordained minister of religion. Nowhere does it appear that a question of credibility was raised when he was before the board. Neither the local board nor the appeal board made any denials of the facts appearing in the file. Appellant showed that the ministry was his exclusive occupation, his vocation. Nothing appears in the file that the performance of his part-time secular work in any way interfered with his full-time ministry.

The records of the draft board, therefore, do not require the Court to weigh the evidence. This the Court cannot do. Weighing of the evidence becomes necessary when—and only when—there is a dispute in the file. Since there is no conflict in the evidence that he devoted his full time to the ministry, the question before the draft boards was a question of law. The boards had only to apply the law. The local board and the board of appeal were not authorized to deny a claim established by the uncontradicted evidence. It was said in *Dismuke* v. *United States,* 297 U. S. 167:

> "This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it." —297 U. S., at pages 172-173.

Recently the United States Court of Appeals for the Tenth Circuit held that where the evidence in the draft board file, filed by the claimant, was undisputed, there was no question presented of weighing the evidence. The court

held that the evidence was undisputed, and established the claim as a conscientious objector as a matter of law.—*Annett* v. *United States,* 205 F. 2d 689, June 26, 1953.

Approving and failing to distinguish the *Annett* case from the one before it, the United States Court of Appeals for the Second Circuit, on October 23, 1953, said, in *United States* v. *Pekarski* (No. 22636): "Though the court may not weigh the evidence before the local board and decisions of the board are final when based on evidence, subject only to administrative appeal, where there is no substantial evidence to support a classification made by the local board jurisdiction is lacking and the order of classification is a nullity. *Estep* v. *United States,* 327 U. S. 114."

An outstanding and correctly decided selective service case applying the above proposition of law is *United States* v. *Alvies,* 112 F. Supp. 618. In that case the evidence on the conscientious objector claim was offered only by the registrant. There was no disputing evidence in the file. The file did not indicate that the board questioned the credibility of the registrant. The Government argued that the draft boards had the right to disbelieve the defendant and the statements appearing in his documents. This was rejected by the court. Also the court distinguished legions of cases where a basis in fact for denial of exemption or deferment was found.—See 112 F. Supp., as pages 622-624.

Decisions applying the same principle above quoted and holding that the denial of the ministerial exemption was without basis in fact have been rendered. These decisions were: *Arpaia* v. *Alexander,* 68 F. Supp. 820 (D. C. Conn.); *Flakowicz* v. *Alexander,* 69 F. Supp. 181 (D. C. Conn.). In each of these cases the status of the man was that of a full-time minister of Jehovah's Witnesses occupying the same status with the organization as does appellant. The facts there match the facts here.

In *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.), a similar determination was made. That case involved the denial of the minister's exempt IV-D classification

by the National Selective Service Appeal Board. The evidence showed that Graham devoted almost 20 hours per week to part-time secular work, and over 100 hours a month to his ministry work. It showed that he was a full-time pioneer of Jehovah's Witnesses. The court said:

> "Nothing appearing to contradict or impeach the verity of his claim as a conscientious objector and as a minister, it is adjudged by this Court that the classification of the defendant in I-A is without any factual foundation."—*United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.).

A similar holding was made in *United States* v. *Burnett,* United States District Court, Western District of Missouri, September 1, 1953, 115 F. Supp. 141. See also *United States* v. *Milakovich,* No. C. 139-336, United States District Court, Southern District of New York, April 6, 1953. The decision is unreported but a printed copy accompanies this brief.

Under the 1940 Act, The United States Court of Appeals for the Seventh Circuit held that one of Jehovah's Witnesses had been illegally denied the ministerial exemption. The Court concluded that the denial of the IV-D classification was without basis in fact.—*Hull* v. *Stalter,* 151 F. 2d 633.

Congress did not intend to confer upon draft boards arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurdisdiction to weigh the testimony. It is then and then only that their decisions are final and binding on the courts. Where there is a denial of the ministerial status and there is no dispute in the evidence (the documentary evidence otherwise establishing that the registrant is a minister) it is the duty of the court to pierce through the shell and hold that there is no basis in fact. It must conclude that there is an abuse of discretion and that the classification is arbitrary and capricious regardless of the board's finding.

Such is the case here. The undisputed evidence shows that appellant pursued his vocation as a minister. This entitled him to Class IV-D. The denial of the exemption is without basis in fact. The I-A classification flies into the teeth of the evidence, is arbitrary and capricious. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, 247 (8th Cir.).

The case of *Estep* v. *United States,* 327 U. S. 114, held that if there was no basis in fact for the classification the action of the board was in excess of its jurisdiction. The Court said that judges may not question an erroneous decision if the evidence must be weighed.—327 U. S., p. 121.

There must be contradiction in the evidence or an impeachment of the registrant before there is a question of weighing the evidence. A board is the judge of a registrant's credibilty. If it fails to appear in the file that the board questioned a registrant's truthfulness, it must be assumed that the claims were judged on the basis of accepting the facts stated by him as true. We do not have here a case where the board denied the truthfulness of the testimony of the registrant.

The question for decision is only whether the undisputed evidence establishes no basis in fact for the classification. Better stated: Is there no basis in fact for the denial of the claim for the exempt ministerial classification?

The Selective Service Act of 1948 and the later Universal Military Training and Service Act (1951) are to be construed more liberally to the registrant than was the 1940 Act. The reason for this rule is to protect the registrant. It is well stated in Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.).

It is not here contended that the Court should scrap the no-basis-in-fact rule stated in *Estep* v. *United States,* 327 U. S. 114. It does seem, however, that in applying the no-basis-in-fact rule under the 1948 Act the Court should be as liberal as possible to registrants. Reasons for this are stated in Ex parte *Fabiani,* 105 F. Supp. 139, at pages 145-

147. The rule of liberal interpretation should authorize the Court to hold that, if there is no contradicting or impeaching evidence that compels a weighing of the evidence, it must be concluded that there is no basis in fact for the classification or the denial of the claim for exemption as a minister.

The facts in this case are brought squarely within the rule announced by the court in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.). In that case the registrant was a full-time pioneer minister for the Watchtower Bible and Tract Society. That is the same status as the appellant has in this case. The rule applied in the *Hull* case ought to apply here. The language of the court is appropriate. That case involved an arbitrary classification of one of Jehovah's Witnesses. —See 151 F. 2d, at pp. 637-639.

Cox v. *United States,* 157 F. 2d 787 (decided by this Court), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, and *Martin* v. *United States,* 190 F. 2d 775 (4th Cir.), do not apply here. The reason is that in both of those cases the registrants had secular vocations. They devoted a large and substantial part of their time to performance of secular work at the time of final classification. In this case the evidence shows that appellant had no full-time secular job.

The minor, incidental hours each week devoted to secular work did not in any way prevent him from full and complete performance of his ministerial duties as his vocation. It did not interfere with his vocation. The evidence showed without dispute that he pursued the ministerial work as his vocation. It did not show that he performed the ministry incidentally to secular work as did the registrants in the *Cox* and *Martin* cases.

The *Cox* case was decided by a divided Court, five to four. No opinion was joined in by a majority of the Court. Mr. Justice Frankfurter merely concurred in the result. He did not agree with the opinion of the four justices with whom he agreed to make a majority and affirm the judgment of conviction.

Even the opinion of the four justices who decided against Cox in that case and in favor of affirmance does not control here. In the *Cox* case these four justices found that the defendants "spent only a small portion of their time in religious activities." Here the facts show appellant devotes many times more time to his ministry than he devotes to part-time secular work. The record also shows that he devotes as much time, if not more, to the performance of his ministry work as do the orthodox clergy.

The opinion of the four justices in favor of affirmance in the *Cox* case was also based on the fact that there was no "definite evidence of his full devotion of his available time to religious leadership" in each case. In this case we have more than appeared in the *Cox* case.

In *Cox* v. *United States,* 332 U. S. 442, there was no showing that the registrants pursued the ministry as their "vocation." The basis of the decision *was not that Jehovah's Witnesses are not ministers.* Nowhere did the majority say that they are not ministers. The majority merely concluded there was no showing that, by reason of the time the petitioners devoted to their ministry, they occupied a position of leadership as Jehovah's Witnesses. They had not dedicated their lives to the furtherance of the religious work of Jehovah's Witnesses. The Court based its decision on a failure to show that the ministry was their full-time job.

In the *Cox* case it was said that the evidence was submitted only by each petitioner. It was emphasized that there was no adequate supporting documentary evidence of their ministerial status. In this case there were filed numerous supporting affidavits. Also filed with the local board was a certificate issued to appellant by the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. It certified that he had been engaged as a full-time minister since November 1, 1950, prior to his registration under the draft.

The evidence submitted to the board by appellant was not contradicted, discredited, or impeached by the local

board. The documentary evidence was accepted by it as true.

In the *Cox* case there was an issue of fact before the local board. In the case at bar there is no issue of fact. The fact situation is clearly within that involved in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.). There is, moreover, no ground for the determination below. The rule stated in *Estep* v. *United States,* 327 U. S. 114, about no jurisdiction because no basis in fact applies.

Attention of the Court is drawn to the opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in *Cox* v. *United States,* 332 U. S. 442—Read 332 U. S., at pp. 456, 457. See *Dickinson* v. *United States,* — U. S. —, November 30, 1953.

The decisions in *Cox* v. *United States,* 332 U. S. 442; *Goff* v. *United States,* 135 F. 2d 610 (4th Cir.); and *Martin* v. *United States,* 190 F. 2d 775 (4th Cir.), have been made inapplicable by the explicit congressional definition of a minister in Section 16 of the act.

It is respectfully submitted that there was no basis in fact for the denial of the claim for ministerial exemption. Appellant should have been classified in IV-D. The I-A classification was arbitrary and capricious.

B.

The performance by appellant of part-time work as a school bus driver incidental to his vocation of the ministry does not constitute basis in fact for the denial of the exemption as a minister of religion.

The evidence showed that appellant devoted about fifteen hours a week during the school months of the year to driving the school bus. This enabled him to earn $640.40 a year. Together with help from other sources he was able to financially maintain himself in the ministry.

No extensive argument is needed to show that the performance of work for that amount of time did not make his secular work his vocation. It is also apparent that his vocation continued to be that of an ordained minister engaged

in regularly and customarily teaching and preaching the doctrines of Jehovah's Witnesses.

Hacker, as a pioneer minister of Jehovah's Witnesses, helped support himself by part-time secular work. Yet he actually devoted as much time to preaching and the duties of the ministry as do the orthodox clergymen, some of whom have congregations wealthy enough to support them without performance of secular work. He spent a minimum of one hundred hours monthly in house-to-house missionary work. Much more time he devoted to studying, attending special meetings, preaching before the congregation and performing congregational duties. The orthodox, church-sustained clergy, do not spend any more time in their activities. Yet they do not ordinarily sustain themselves by part-time secular work as does Hacker.

The court below, however, could have taken judicial notice of the fact that many poor preachers who work to support themselves are also aided by the congregations that they serve. The apostle Paul said: "The workman is worthy of his wages." (1 Timothy 5:18, *New World Translation*) Members of the congregation frequently give poor preachers meals, donate clothing to them, etc. The needs of the minister are often taken care of by gifts in order to see that he is able to continue in the Lord's work. Jesus indicated that if God can provide for the birds of heaven he can also support his ministers by causing gifts to be made to them. —Matthew 6:25, 26; Luke 12:22-24; Exodus 16:4; 1 Kings 17:6.

The fact that appellant may perform secular work in no way interferes with or prevents his performing his duties as a minister of religion. The source of financial revenue of persons excused by the act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.—See *supra,* pages 29-35.

It is plain that the vocation and calling of appellant —like many orthodox clergy who perform incidental secu-

lar work—is his ministry, rather than the inconsequential incidental work he performs.—See *Dickinson* v. *United States,* — U. S. —, November 30, 1953.

It is respectfully submitted that the part-time performance of secular work by appellant in no way interfered with his exempt ministerial status under the act. It provided no basis in fact for the denial of exemption as a minister of religion. He should have been classified IV-D. The placing of him in I-A classification was arbitrary and capricious.

C.

That Hacker occupied another office as a minister in the organization of Jehovah's Witnesses, the presiding minister of the Chino, California, Congregation of Jehovah's Witnesses, incidental to his work as a pioneer minister, does not affect his vocation as a full-time pioneer minister of Jehovah's Witnesses.

Hacker was the presiding minister of the Chino Congregation of Jehovah's Witnesses. The congregation is not a congregation of laymen. It is a group of ministers and missionaries. Whether each of these persons is qualified for exemption under the act is immaterial. It still remains that they are not laymen.

Appellant had two congregations. His first and main congregation was his congregation in the missionary field. There he preached in the homes of the people as a minister. This was quite a sizeable group of people. Together they made up his congregation. His other congregation was that which met together at the meeting place for Jehovah's Witnesses. It is called the Kingdom Hall. His duties at the meeting place were duties of a minister. They may be described as synonymous to the duties of an administrator in the office of some orthodox religious group.

Each one of Jehovah's Witnesses is a minister. This is because he has been ordained and preaches to his own congregation. The congregation of each is found in an assigned missionary field. Whether the congregation of Je-

hovah's Witnesses is an organized group of evangelists engaged in home missionary work, either part-time or full-time, is immaterial. It does not prevent the duties performed by appellant as presiding minister from being those of a minister of religion.

It should be remembered that the case involves the activities and work of appellant. The work and activities of other members of his congregation are wholly irrelevant and immaterial. That most congregations of the various religions are composed of laymen is immaterial. The orthodox yardstick of the clergyman in the pulpit, with laymen in the pews, cannot be applied here. It is no measuring rod.

No comparison can be made between a congregation of laymen and a congregation of missionaries. The fact that a group of carpenters get together and elect a chairman to preside over them does not keep the chairman from still being a carpenter. That a group of ministers and missionaries gather in a congress or college, and appoint a presiding officer, does not prevent the minister thus elected to the special office from being a minister. So it is with appellant.

Jehovah's Witnesses are a society of evangelists, missionaries and ministers. It is not unusual to hear of a society of missionaries or a society of ministers. The Jesuits are known as the Society of Jesus. This is a well-known international Catholic society of ordained priests. Before being a member of that organization one must be a Catholic priest. In various other Catholic societies, such as the Catholic Missionary Society, and the orders of monks of different kinds, the members are confined to ministers, priests and lay brothers. The Baptist Home Missionary Society and other missionary societies of the popular orthodox religious groups have membership confined to ordained ministers. No one can become a member of such societies unless he is ordained and engaged in the field missionary work.

In all such societies they do not have the clergy and

laity distinction. Such groups, when they assemble, gather as a congress of ministers. The congregation of Jehovah's Witnesses at Chino assisted by appellant assemble in the same manner. The fact that they were all ministers did not prevent appellant from being a minister of the gospel.

The undisputed evidence shows that appellant spoke from the pulpit or platform in the congregation. This was another part-time job for him. He preached to the congregation. He used the Bible as the source of his guidance of the congregation in public worship. The fact that the audience that he spoke to were ministers instead of laymen did not in any sense of the word change the nature of his work.

It is agreed that the office of congregation servant or presiding minister *alone* (a part-time job, not full-time) did not entitle appellant to be classified as a minister of religion. Had the duties of the presiding minister required all of his time to the work, then there would be no doubt that he would be entitled to the exemption. His duties were not confined to the performance of the part-time office as presiding minister. He had a full-time job as a pioneer. It was this full-time missionary work that he was performing in the field that entitled him to the classification.

The duties of the presiding minister of the congregation, which he performed, actually buttressed his vocation and claim for exemption based on his full-time missionary work. It supported his ministry. It made the claim stronger. He showed more than the law required for exemption. His job as presiding minister was a performance of another, second, religious office. It was in addition to his work as a pioneer, which was his vocation. By law it made him exempt regardless of his position as presiding minister.

It is respectfully submitted that appellant is exempt as a minister by reason of his full-time pioneer missionary activity (regardless of performance of duties as presiding minister of the congregation). The part-time presiding-minister work merely augments his claim for exemption as a full-time minister.

D.

Nothing said by the Government about the status of appellant as a full-time pioneer minister prevents his classification as a minister of religion based alone on that activity.

The act and the regulations, as has been shown, have no orthodox limitations. They provide for a general exemption that protects all full-time ministers of all religious organizations. It was not intended by Congress to limit the exemption to only the minister who acted as the full-time presiding minister of a congregation of laymen meeting in a building. As has been shown, it extends to all who pursue their ministry as their vocation, regardless of the duties they perform in their particular religion.

The courts have construed the law to protect the full-time pioneer missionary of Jehovah's Witnesses, even when he does not act as the presiding minister of a congregation. —*Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Burnett,* United States District Court for the Western District of Missouri, September 1, 1953, 115 F. Supp. 141.

Whatever uncertainty existed in the 1940 Act about the amount of time required to be devoted to the ministry (see *Cox* v. *United States,* 322 U. S. 442) was removed when the 1948 Act was passed. The new statute required that before a registrant could successfully claim exemption as a minister of religion he would have to show that he pursued his ministry as his vocation.

The present act when properly interpreted exempts appellant. The undisputed evidence shows he has pursued the full-time pioneer field missionary work as a minister of religion. It is undeniably his vocation. His position in the organization as a pioneer makes him one of the leaders. He is a leader because the ministry of Jehovah's Witnesses is his vocation.

His position as presiding minister of the congregation

makes him a special leader of others of Jehovah's Witnesses. This alone does not entitle him to the exemption because his duties in that office are not his vocation. He contends that his leadership before and among the congregation located among the homes of the people within the boundary of his missionary territory makes him exempt. It is in these homes that he has a congregation of laymen. They depend upon him for spiritual guidance. He is their leader.

A religious congregation is not necessarily confined to members who meet in a cathedral or in another church edifice. It is true that those who gather in such places are a congregation of religious people. These may not all be members of the church presided over by the minister. A careful study of history of religion heretofore reviewed (*supra* at pages shows that a congregation of an itinerant evangelist and peripatetic minister may be—and often is —found either on the streets or in the homes of the people.

Appellant, according to the testimony and the papers in his draft board file, is this type of a primitive minister. He, like the apostle Paul, 'teaches publicly on the streets,' and also in the homes of the people. (Acts 20:20; Luke 22:24-27) Dickinson in his territory, as did Christ Jesus, went around "about the villages, teaching" and 'preaching the gospel of the kingdom.'—Mark 6:6; Matthew 9:35; Luke 8:1.

Appellant followed the advice of Peter which is to preach primitively like Jesus. Peter said: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2:21) Jesus told all of his primitive followers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10:7, 10-14) James emphasized the duty of a Christian evangelist: " . . . to visit the fatherless and widows in their affliction." (James 1:27) It was done at their homes.

It is in the homes of the people therefore that the main congregation of appellant is found. He discharges the re-

sponsibilty put upon him by the law of God and the governing body of Jehovah's Witnesses as a Christian evangelist and minister, following in the footsteps of Jesus. He answers the need of thousands of people in his vast missionary field. It is well known that a large percentage of the people do not belong to any church. They therefore never go to church. A large percentage of the people, although they are members of a church, do not attend. The only way that these people can be served with spiritual truths, and kept free from the disintegrating influence of ignorance of the Bible and from communism, is by having the gospel preached to them at their homes. This appellant did.

The facts show that, in addition to distributing books containing religious sermons, appellant also answers Bible questions. He also conducts home Bible services as a minister in the residences of the people. Furthermore, he administers to their spiritual needs as their minister. He customarily serves regularly each week the same people in the performance of his missionary preaching.

Even if appellant's activity were confined to the distribution of books in his missionary field, he still would be exempt. The distribution of religious literature in his missionary field may be his major activity. But he also preaches orally in the homes of the people. For the purpose of argument only, let it be conceded that he does nothing but distribute literature as a minister of Jehovah's Witnesses. Still, in accordance with the national policy expressed by the Court and that of the Selective Service System, he would be exempt as a minister.

The ecclesiastical determination of Jehovah's Witnesses is to use literature—written sermons—as a means of preaching the Word, and not confine preaching to oral sermons. That ecclesiastical determination as a proper method of preaching is binding upon this Court. The Government and the draft boards must concede that it is preaching employed by Jehovah's Witnesses. This preaching through the use of literature is unassailable. It is beyond the competency

of the draft boards or the courts to encroach upon the ecclesiastical determination made by the governing body of Jehovah's Witnesses. This method must be considered to be religious preaching, the same as preaching from the pulpits. This was so held in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109.

The religious book colporteurs of the Seventh-day Adventist group have been declared to be exempt under the 1940 Act as ministers of religion. While this group are not ministers in the sacerdotal sense or ordained as are Jehovah's Witnesses, they are ministers of religion within the meaning of the act. A predetermination of their ministerial status was made by General Lewis B. Hershey in his *State Director Advice 213-B,* June 7, 1944, Selective Service System, Washington, D. C. He said that they are ministers "even though they are not ordained." When each is "found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials," he is entitled to the exemption. The Seventh-day Adventist colporteurs are mere "Gospel workers." Their qualifications are claimed to be equal in standing, however, with those who preach the gospel.—White, *The Colporteur Evangelist,* Mountain View, California, 1930.

The Director of Selective Service has declared Jehovah's Witnesses to be entitled to the ministers' classification. In *Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), Washington, Government Printing Office, 1943, he said that the ministerial exemption extended to "the Jehovah's Witnesses, who sell their religious books, and thus extend the Word." (P. 241) The Director said in this same report that all that is required of the minister of religion claiming the exemption is that he show that he has "dedicated himself to his task to the extent that his time and energies are devoted to it to the substantial exclusion of other activities and interests."—*Selective Service in Wartime,* p. 241.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

See also *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.).

Appellant showed that he had satisfactorily pursued the course of study prescribed by the Watchtower Bible and Tract Society. He completed his training as a minister. The organization found that he was fit and qualified to become (1) a regular minister, and (2) an ordained minister. This determination was an ecclesiastical determination. It is not subject to review before the draft boards or in the courts.

While it was not required that he go to a theological school or attend a divinity college, he did attend the Watch-

tower Theocratic Ministry School conducted at his congregation. He showed that he had a knowledge of the Bible. He was apt to teach and preach. He knew sufficient of the doctrines of Jehovah's Witnesses. The ecclesiastical determination as to what schooling qualified him to become a minister of Jehovah's Witnesses is not subject to criticism by the Government, the draft board or the courts.

It has many times been determined that the question and the propriety of the ordination of a minister of religion is not for the government or any agent thereof to question. If it is sufficient to the religious organization, it is satisfactory to the law. The adequacy of appellant's ordination is binding on the Government. The ecclesiastical determination of Jehovah's Witnesses that baptism is their ceremony or method of ordination cannot in any way be questioned or disputed by the court below or by the Government.

Appellant described to the local board that the ordination ceremony was that of baptism. He said it was the organizational method of Jehovah's Witnesses to ordain.

The Director of Selective Service declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups, "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme."—*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 240, Washington, Government Printing Office, 1943.

The submission to the ordination ceremony of public immersion in water branded appellant as a duly ordained minister of Jehovah's Witnesses. It marked him as a person who dedicated his life to the service of Jehovah God as a minister. It bound him to preach the gospel of God's kingdom as long as he lives. His ordination carries the accept-

ance of obligations which it imposes. There is entered into a complete, unbreakable agreement on the part of the minister thus ordained to follow in the footsteps of Christ Jesus. The one ordained cannot abandon his covenant to preach, for any reason. The covenant requires faithfulness—even to the point of death. An ordained minister of Jehovah God cannot retire or quit preaching without violating his covenant. Turning back from preaching results in his everlasting death. God declares that covenant-breakers "are worthy of death."—Acts 3:23; Romans 1:31, 32.

The ordination of Jehovah's Witnesses emanates from the Most High God "whose name alone is JEHOVAH." (Psalm 83:18; Isaiah 61:1-3) He is the source of all authority. Jehovah is the One who authorizes his witnesses and ordains his ministers. He has fixed the ordination ceremony used by Jehovah's Witnesses. Their ordination is identical to the ordination ceremony Christ Jesus underwent. A very simple ceremony marked the beginning of his ministry. He was merely baptized in the river Jordan. (Matthew 3:13-17) That was it. It is this same simple ordination ceremony every one of Jehovah's Witnesses goes through. By this he dedicates himself to preach. It is his ordination.

The courts cannot question the formal ordination of Jehovah's Witnesses through the use of the ceremony of water baptism. Yet even if the courts were to make a fair review of the history of the Christian church it would show that this was the ordination ceremony of all ministers of the early church. It has been shown that this was the ordination ceremony of the Lord Jesus and his apostles.—See the paragraph above.

Secular references will establish that this same ordination ceremony was pursued by the Christian church following the death of the Lord Jesus and the apostles.

Doctor Charles Hase, celebrated German historian, in his book *History of the Christian Church,* pp. 40, 41, New York, Appleton and Co., 1855, says of the early church:

> "Everyone who had the power and the inclination to speak in public was allowed to do so with freedom. Baptism as an initiatory rite was performed simply in the name of Jesus."

The same ordination ceremony or baptism as the sole rite preparatory to the ministry or preceding was declared by the great theologian, Martin Luther. In the book, *The Age of the Reformation,* by Professor P. Smith, page 71, London, Cape, 1920, it is stated:

> "Luther demolishes these walls with words of vast import. First, he denies any distinction between the spiritual and temporal estates. Every baptized Christian, he asserts, is a priest, and in this saying he struck a mortal blow at the great hierarchy of privilege and theocratic tyranny built up by the Middle Ages."

These historical references and others clearly demonstrate that the basic ceremony of ordination for the true Christian minister is that now used by Jehovah's Witnesses. It is that of baptism alone. Jehovah's Witnesses therefore are not importing new meaning to the word "ordination." Jehovah's Witnesses are actually getting back to the basic principles of the early Christian church in the matter of ordination. Their ordination ceremony is unadorned by the additions made by ecclesiasticism of modern times. It is ancient. It is not novel or special.

The assault by the Government against the ordination of appellant defies the fundamental principle of the Supreme Court of finality of ecclesiastical determinations. It also contradicts history of religion and the general law of the land. This is expressed in many decisions saying what constitutes an ordained minister. It has been held that the law "has no regard to any particular form of administering the rite or any special form of ceremony."

> "It has been the practice of this court, there-

> fore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies."—In re *Reinhart,* 9 Ohio, Dec. 441, 445.

The British courts have also given the same broad and liberal interpretation to the term "ordained minister." In a case involving the ministry exemption under the draft law of Canada Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien* v. *Cooke,* 1 W. W. R. (1944) 237, said:

> "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

That a draft board can reject the claim of a minister because of his youthfulness is arbitrary and capricious. It cuts the ground out from under history itself. It nullifies completely the intent of Congress. Surely if Congress intended to disqualify young ministers or to place an age limit on ministers of religion it would have said so. If the Presi-

dent desired to make youthfulness an element of disqualification he could have very easily done so in the regulations. Since neither the act nor the regulations provide for the forfeiture of the exemption because of youthfulness, it is beyond the authority of the courts to so amend the act and regulations. The judges cannot read into the act this alien doctrine.

If youthfulness were an element, Congress would have made no provision for the ministerial exemption. The age limit of the draft law is from 18 to 26. If a young man under 21 or not over 26 is not qualified to be a minister, then Congress did not know what it was doing. It provided for the ministerial exemption of men as young as 18 and not older than 26. The very fact that there is duty imposed on a man between 18 and 26 under the act carries with it the correlative right of an exemption to a man between 18 and 26. If young ministers are not exempt then where will religion be when the old ministers die? Such a holding would be against the public welfare and the history of religion.

Preaching at an early age is not unusual to followers of Christ. (Deuteronomy 6:4-7; Ephesians 6:1-4; Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19) The ministry is not confined to adult persons or to the aged. Youths not only are permitted to preach, but are invited to do so. (Joel 2:28, 29; Psalm 148:12, 13) Ancient outstanding examples are Samuel, Jeremiah and Timothy, whose faithfulness as Jehovah's Witnesses in early youth is proof that it is proper for young men to act as ministers. (1 Samuel 1:24; 2:11; 3:1; Jeremiah 1:4-7) Paul the apostle declares that he sent Timothy forth as a minister. (1 Corinthians 4:17) Timothy was instructed by Paul to let none despise his youthfulness.—1 Timothy 4:12.

Christ Jesus, when but twelve years of age, was already about his "Father's business," discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, he said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."—Luke 18:16;

see also Matthew 18: 1-6; Psalm 148: 12, 13; Proverbs 8: 32.

History concerning the popes, archbishops and bishops of the Catholic Church and the clergymen of the orthodox Protestant denominations reflects that many ministers began their ministry at the age of 12 and upward.

John Calvin, the sixteenth century reformer and head and founder of the Calvinistic school of theology, was a chaplain at the age of 12 years. He was at that time a priest in the Roman Catholic Church. Calvin was born in 1509. Concerning him the *Encyclopædia Britannica,* Vol. 4, edition of 1892, says:

> "In his thirteenth year his father, whose circumstances were not affluent, procured for him from the bishop the office of chaplain in the Chapelle de Notre Dame de la Gesine. A few days after his appointment he received the tonsure and on the 29th of May 1521, he was installed in his office."

Centuries earlier, Benedict IX was installed as pope at the age of 12 and continued in office from 1033 to 1056.

Life magazine carried an article entitled "A 17-Year-Old Minister" in its March 9, 1953, issue. The article reads:

> "Lasserre Bradley, Jr., who had always felt that he had a calling to be a minister, preached his first sermon at the age of 13 in a small Baptist church near his home in Lexington, Ky. The congregation was amazed and delighted by the sermon, which was entitled 'Prepare to Meet Thy God.' At 15 Lasserre organized a congregation in a backwoods community in Kentucky, and the next year his congregation asked Lasserre's home church to ordain their young leader. He was brought before a panel of some 20 ministers who, knowing that their action might be held up to ridicule, made their questions harder than usual.

Lasserre had never studied theology formally but he answered questions about the Bible and Baptist doctrine without a flaw and was promptly ordained.

"Today, the Rev. Mr. Bradley, only 17 and still in high school, is pastor of the large New Testament Baptist church in Cincinnati. He drives there each week end to preach, baptize and conduct funerals and weddings. On Friday afternoons, after finishing school, Lasserre jumps into a car given him by an auto dealer and drives 97 miles to Cincinnati. Over the week end he eats and sleeps in the homes of members of his congregation, getting up early Monday to be back home in time for school. His congregation, an independent Baptist group, was hesitant at first about taking on so young a minister. But under his leadership membership has jumped from 480 to 530, and the congregation, which used to rent quarters, has completed negotiations for buying an old theater for $110,000 to be its church. Lasserre, who graduates from high school in June, plans to continue as pastor while going to college."—Pp. 119-122.

It is respectfully submitted that the undisputed evidence showed that appellant—(1) was a representative of a duly recognized bona fide religious organization, (2) preached the doctrines of Jehovah's Witnesses as an ordained minister, (3) devoted his full time to preaching, which excluded full-time secular work, and (4) had the ministry *as his vocation.* Since the record showed that his proof was not disputed, he should have been classified as a minister of religion and exempted from training and service. Denial of exemption was arbitrary and capricious. The classification was therefore without basis in fact.

CONCLUSION

WHEREFORE the appellant prays that the judgment of the court below be reversed by a judgment of this Court declaring the draft board order to be void and directing the trial court to acquit the appellant and dismiss the indictment.

Respectfully submitted,

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